Supreme Court, U.S.
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No. 97-2039

In The

Supreme Court of the United States

October Term, 1997

ALAN HAVIGHURST and DOUGLAS HAVIGHURST,

Petitioners,

vs.

THE FIRST NATIONAL BANK OF SOUTHWESTERN OHIO, Executor of the Estate of WALTER HAVIGHURST,

Respondent.

On Petition for Writ of Certiorari to the Court of Appeals of Ohio, Butler County

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

I. Whether there is an absolute right to a jury evaluation of factual issues arising in a declaratory judgment action in a state probate court where the relief sought in the declaratory judgment is equitable in nature.

II. Whether a state trial court has the authority to effectuate the intent of the testator in the context of a charitable trust where a fiduciary, had the right and duty to file a complaint for declaratory judgment and the court had the authority to render judgment pursuant to established provisions of the Ohio Revised Code.

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STATEMENT OF THE CASE

A. Procedural History

Walter E. Havighurst, the Testator herein, died on February 4, 1994, at the age of 92. His Will dated September 7, 1988, and a Codicil thereto, dated October 11, 1989, were admitted to probate by the Butler County, Ohio Probate Court on February 11, 1994. The Testator's spouse had predeceased him, and he was survived only by a sister and several nieces and nephews.

By his Will and Codicil the Testator left $100,000 to his sister; $130,000 to his surviving nieces and nephews; items of personal property to his niece, Ruth Havighurst Neff and her husband, Sam; his residential real estate to Miami University (appraised at $195,000); forgave a debt, originally in the amount of $50,000 owed to him by Douglas and Sue Wilson; a painting, his books and manuscripts to Miami University; and his clothing to Goodwill Industries. In addition, he left $250,000 to Miami University as an endowment for the Special Collections Library at that institution, a collection which bears his name.

The residue of his estate was left to the First National Bank of Southwestern Ohio, in trust, for the promotion of educational projects through the Miami University International Center. It is the terms and conditions of this residual gift which constitute the gravamen of this case.

On October 20, 1994, the Executor of the Testator's estate, the First National Bank of Southwestern Ohio, the Respondent herein, filed a *Complaint for Declaratory Judgment* in the Butler County Probate Court, as it had the authority and duty to do so as a fiduciary pursuant to R.C. § 2721.05, 109.25, and 109.30 (T.d. 1).

Answers were filed, some pro se, by the parties Defendant, including the Ohio Attorney General.[1] In addition to their Answers, Petitioners Alan W. Havighurst and Douglas A. Havighurst, nephews of the Testator, filed Counterclaims, alleging, inter alia, that the decedent's "putative trust cannot be carried out in accordance with its terms" and requesting that the Court declare the Testator's residual estate to be intestate property, or that the Court implement an alternative plan as to Testator's residual estate, as proposed by the Appellant-Petitioners.

The Court made several pre-trial rulings while the case was pending, pursuant to Motions filed by the parties, and on its own initiative, including the granting of the Respondent's *Motion to Strike Jury Demand of Appellants* (T.d. 194) (Petitioner's Brief, p. 32-a).

The matter was tried to the Court on September 5 and 6, 1995. The Court then entertained post-trial briefs from the parties. The Court entered its *Opinion and Judgment Entry of Declaratory Judgment, Final Appealable Order* on December 15, 1995 (T.d. 224) (Petitioner's Brief, p. 39-a). The Trial Court, pursuant to Appellant-Petitioners' request, issued its *Findings of Fact and Conclusions of Law* on February 21, 1996 (T.d. 233) (Petitioner's Brief, p. 68-a), and its *Amended Entry of Declaratory Judgment, Final Appealable Order* (T.d. 234) (Petitioner's Brief, p. 87-a). To clarify matters, this *Amended Entry of Declaratory Judgment, Final Appealable Order*, was not issued on December 15, 1965, as the Petitioner's Brief states, but rather, on February 21, 1996.

The Appellant-Petitioners appealed from these entries of the Butler County, Ohio Probate Court to the Twelfth District

1. The Ohio Attorney General was a necessary party to this action pursuant to Ohio Revised Code Section 109.24.

Court of Appeals of Ohio, Butler County. The Twelfth District judges recused themselves, and the case was decided by a three-judge panel comprised of justices from the First Appellate District, as assigned by Ohio Supreme Court Chief Justice Thomas Moyer. The panel issued an opinion on June 6, 1997, affirming the decision of the Trial Court (Petitioner's Brief, p. 3-a). Petitioners filed a Motion to Certify with the Ohio Supreme Court (Petitioner's Brief, p. 93-a) and a Motion for Rehearing with that Court (Petitioner's Brief, p. 94-a), both of which were denied. Petitioners now seek a writ of certiorari to the Supreme Court of the United States.

B. Statement of Facts

Pursuant to the Complaint for Declaratory Judgment and the pleadings of the parties subsequent thereto, the following facts were admitted to be true:

1. that the Will and Codicil of Walter E. Havighurst, admitted to probate by the Butler County, Ohio Probate Court, was the Last Will and Testament of the Decedent;

2. that the Declaratory Judgment action before the Court was for the purpose of determining a question of construction of the Charitable Trust, set forth in the Testator's Will;

3. *that the Probate Court had proper jurisdiction over the matter* (emphasis added);

4. that all parties who had an interest or claim which would be affected by the declaratory judgment of the Court had been made parties to the action;

5. that the Defendant Attorney General of Ohio was a necessary party to the action;

6. that Miami University, who was named in several parts of the Testator's Will is a state-supported institution of *higher education* in the State of Ohio (emphasis added).[2]

Given these facts, the issue before the Court was the interpretation of the provisions in the residual clause of the Testator's Will, to give construction thereto, and determine the rights and responsibilities of the parties, given the Court's construction and findings (T.d. 190).

At trial, the parties also agreed that the Union of Soviet Socialist Republics, as a political entity, no longer existed.

The Plaintiff-Appellee, First National Bank of Southwestern Ohio, Respondent herein, introduced the testimony of Dennis G. Walsh, a Trust Officer with the Plaintiff. Mr. Walsh established by his testimony that the Testator had a long-standing relationship with the Plaintiff, as did the Testator's deceased wife (T.p. 15); that based on his review of the Will, his conversations with certain members of the Testator's family; his review of the proposed plan submitted by Miami University; and advice of counsel, that the Plaintiff-Appellee could carry out the intentions of the Testator in relation to the terms of his Will regarding his residual estate (T.p. 16, 17, 18 and 19). Mr. Walsh, on cross-examination by Petitioner's counsel, set forth the elaborate procedures that the Testator included in his Will

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2. Plaintiff-Appellee's Complaint for Declaratory Judgment (T.d. 1); Answer of Attorney General, Lee Fisher (T.d. 19); Answer of Defendant-Appellant, Alan W. Havighurst (T.d. 38); Answer of Defendant-Appellant, Douglas A. Havighurst (T.d. 39); Answer of Defendant, Miami University (T.d. 42).

so that his charitable intentions would be carried out, to wit: involvement by a corporate Testamentary Trustee with fiduciary duties and subject to review by the Probate Court (T.p. 32); that written plans for the use of the funds would have to be submitted to the Trustee by Miami University, for review (T.p. 32); that the President of Miami University would oversee the expenditures (T.p. 35); that the Trustee would seek direction from the Probate Court regarding the management and distribution of the trust assets (T.p. 36).

The former President of Miami University, Paul Pearson, testified that he had met with the Testator in August of 1988 (T.p. 42), a few days before the date of the Testator's Will and that the Testator had discussed the details of his specific testamentary intent with Mr. Pearson (T.p. 43).

The Respondent's expert witness, Paul Allen Goble is a renowned author and scholar on the territory that was the Soviet Union. He has visited the area formerly known as the U.S.S.R., speaks Russian as well as the languages spoken in 10 of the 14 former Soviet Republics, has briefed members of Congress and agencies of the local government (T.p. 97).

Mr. Goble gave unequivocal testimony supporting the position that the Testator's intent could be carried out, despite the fact that the U.S.S.R. no longer existed as a political entity. Goble testified that university academic programs, Web sites, and E-mail correspondence still refer to the area of the former U.S.S.R. as an "integral whole" (T.p. 101). Academic presentations to the public regarding the "Soviet Union" are still relevant and important (T.p. 106). Given the presence of nuclear weapons in that area, the study of the current relationship of the U.S. government and the governments of the 11 countries that were formerly part of the U.S.S.R., and now the Russian Federation, is extremely important (T.p. 107). In addition, there

is a current need to fund exchanges of municipal officials, educators and students from the United States to the countries of the former Soviet Union as well as from those countries to the U.S. (T.p. 108, 109 and 116). It is critical for the U.S. as a nation, to study the language and culture of the area and this need is more critical today then it was prior to the fall of the U.S.S.R. as a political (T.p. 114, 115, 139 and 140). Finally, Mr. Goble testified that each of the nine guidelines (Petitioner's Brief, p. 102-a) could be "realized" (T.p. 117).

The Respondents presented the testimony of Dr. Joseph Urell, the Associate Vice President and Associate Provost at Miami University. Dr. Urell testified that after the Testator's death, he convened a committee of individuals who had "some acknowledged expertise in the area now known as the former Soviet Union," and who had backgrounds "in a diversity of disciplines, business, economics, education, history, political science . . ." (T.p. 61). He also engaged consultants from outside the University (T.p. 63 and 64) to provide input to the committee. This committee developed a plan to implement programs at Miami University "that were consistent with the Will" (T.p. 65) fully incorporating the Testator's nine guidelines (T.p. 68). Dr. Urell, on behalf of the then President of Miami University, consulted with Ruth and Sam Neff, the Testator's niece and her husband (T.p. 69 and 70) as required by the Testator's Will.

The Petitioner's called as their expert witness Heather Hogan, a professor of history at Oberlin College. Professor Hogan's indicated area of scholarship and teaching is Modern Russian History (T.p. 154). Professor Hogan, by her testimony, supported the "efficacy of doing cross-cultural programs with the former Soviet Union in the content of university setting" (T.p. 157); she advocated the current study of "Russian and Soviet Studies" in the context of a liberal arts education

(T.p. 170-171); she stated that from a historical standpoint, the study of the Soviet Union, as it existed continues to be a legitimate area of study (T.p. 172) as would be the political history and the types of governments that the peoples of the former Soviet Union believed in or tried (T.p. 174). Professor Hogan also testified that she would like to expose her students to the artistic endeavors and cultures of the peoples of the former Soviet Union (T.p. 176).

Professor Hogan further offered that the study of "Soviet Politics" continued at her institution even after the fall of the Soviet Union in 1991 (T.p. 180) and that in her opinion, the need to study that part of the world remained justified (T.p. 181).

After consideration of the testimony, exhibits presented at trial, and the parties' post trial briefs, the Trial Court issued its *Findings of Facts and Conclusions of Law* and its *Amended Judgment Entry of Declaratory Judgment,* as stated above, on February 21, 1996, which inter alia, dismissed the Amended Counterclaims of the Appellants and found that the

> charitable trust created by the provisions of Item III, Paragraph G of the Last Will and Testament of Walter E. Havighurst be fully funded and carried out in accordance with its terms . . .

(Petitioner's Brief, p. 90-a).

The three-judge panel sitting for the Court of Appeals, Twelfth Appellate District of Ohio, Butler County, affirmed the decision of the Trial Court on appeal. The Petitioners' counterclaims were "predicated on the assertion that the Testator's aim was to ease Cold War tensions between the United States and the U.S.S.R." and maintained that the trust must fail

since the collapse of the U.S.S.R. meant that the threat of nuclear war had come to an end. The Appellate Court found that the manifest weight of the evidence rendered the Petitioners' counterclaims meritless, stating:

> . . . the evidence was *uncontroverted* that the region still possesses a nuclear capacity that, with the demise of the U.S.S.R. as a political entity and the consequent destabilization of the region continues to pose a threat to the United States.

First National Bank v. Miami University, et al., Court of Appeals, 12th Appellate District of Ohio, Butler County (1997) (Petitioner's Brief, p. 10-a).

The Appellate Court furthermore stated that the judgment of the lower court was sufficiently supported by the evidence:

> Our review of the record of the proceedings below discloses that the probate court had before it competent and credible evidence to support its entry of declaratory judgment preserving the trust and its dismissal of appellants' counterclaims.

First National Bank v. Miami University, et al. (Petitioner's Brief, p. 10-a).

The Court continued by rejecting the Petitioners' second assignment of error, where the Petitioners posed a challenge to the denial of their demands for a jury trial. This assignment of error constitutes the Appellate-Petitioners first issue in their petition for a writ of certiorari and is dealt with in the following section.

REASONS FOR DENYING THE WRIT

I.

THE OHIO PROBATE COURT HAD THE AUTHORITY TO DENY THE PETITIONERS' REQUEST FOR A TRIAL BY JURY, SINCE THE PROBATE COURT HAS JURISDICTION CONCURRENT WITH THE GENERAL DIVISION OF THE COMMON PLEAS COURT, AND THERE IS NO ABSOLUTE RIGHT TO A JURY EVALUATION OF FACTUAL ISSUES ARISING IN A DECLARATORY JUDGMENT ACTION IN PROBATE COURT. THE PROBATE JUDGE HAS THE AUTHORITY TO ACT PURSUANT TO OHIO REVISED CODE §2101.31 AND DETERMINE "ALL QUESTIONS OF FACT." EVEN IF THE MATTER HAD ARISEN IN THE COURT OF COMMON PLEAS, R.C. §2311.04 WOULD NOT ACT TO EXTEND THE RIGHT TO A TRIAL BY JURY, SINCE THE RELIEF SOUGHT IS PREDOMINANTLY EQUITABLE IN NATURE.

Petitioners contend that their rights under the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution have been violated due to an apparent conflict between two provisions of the Ohio Revised Code, §§ 2101.31 and 2311.04, and that they were improperly denied the right to a trial by jury. This contention lacks merit, as evidenced by nearly 150 years of precedent, and furthermore is misguided due to the fact that the matter originated not in the Court of Common Pleas, General Division but in the Probate Court. In addition, *even if the matter had originated in the General Division of the Common Pleas Court*, there would not have been an absolute right to a jury trial. Indeed, under the facts in the case at bar, R.C. § 2311.04 would *not* have conferred the right to a trial by jury.

The Petitioners' Brief claims that had the matter originated in the General Division of the Court of Common Pleas, where it *could* have been originally filed, there would have been a right to a trial by jury pursuant to R.C. § 2311.04. Petitioner's Brief, p. 12. This assertion is misguided in several respects.

First National Bank opted to proceed in the Probate Court, as it had every right to do so. As the Court of Appeals of the Twelfth Appellate District of Ohio stated:

> . . . the probate division and the general division of the common pleas court have concurrent jurisdiction to hear and determine an action involving a charitable trust. R.C. § 2101.24(B)(1)(b). FNB [First National Bank], therefore, could have instituted and maintained its declaratory judgment action in *either the probate division or the general division of the common pleas court.*
>
> Once FNB chose to proceed in probate court, appellants' options were limited. As between courts of concurrent jurisdiction, *the court that first acquires jurisdiction over the parties has exclusive jurisdiction to adjudicate the matter.*

(Petitioner's Brief, p. 16-a). *First National Bank v. Miami University, et al.* (1997), Court of Appeals, 12th Appellate District of Ohio, Butler County (emphasis added). *See also Kane v. Kane* (1946), 146 Ohio St. 686, 67 N.E. 2d 783.

As the Petitioners' Brief concedes, the Probate Judge had the authority to deny the right to a trial by jury. R.C. § 2101.31 clearly and unequivocally gives the Probate Judge the authority to determine "all questions of fact" unless "he orders them tried by a jury . . ." or referred to a jury. Therefore, the Probate Judge,

in *his sole discretion* shall determine who shall be the trier of facts. 35 O. Jur. 3d, *Declaratory Judgments* § 41, at 85 and 86.

The Ohio Supreme Court has upheld the right of the probate court to determine issues of fact and law in *all* matters brought to that court. The court in *Renee v. Sanders, et al.*, 160 Ohio St. 279, 116 N.E. 2d 420 (1953) held that when a matter is within the jurisdiction of the probate court in a declaratory judgment proceeding, R.C. § 2101.31 governs the proceedings and gives the Probate Judge the discretion to decide whether issues of fact will be tried by a jury. *See also Bobko v. Sagen*, 61 Ohio App. 3d 397, 407, 572 N.E. 823, 829-830 (1989) and *State ex rel. Kear v. Court of Common Pleas of Lucas County, Probate Division*, 61 Ohio St. 2d 189, 191, 423 N.E. 2d 427, 429 (1981).

In *Giurbino v. Giurbino*, 89 Ohio App. 3d 646, 626 N.E. 2d 1017 (1993), the Cuyahoga County Court of Appeals reviewed this issue, citing R.C. § 2101.31, *Bobko*, and *Renee*. The *Giurbino* court reaffirmed that the Probate Judge shall determine all questions of fact presented to the Probate Court, even in declaratory judgment actions, unless the Judge orders such issues to be tried by a jury. The *Giurbino* court directly addressed the issue of the conflicting code provisions, citing *Renee* as follows:

> This rule [R.C. § 2101.31] applies despite language in R.C. § 2311.04 which provides that issues of fact arising in actions for the recovery of real or personal property be tried by a jury.

Petitioners claim that R.C. § 2101.31 in this case should "not be allowed to trump" the jury trial provision as set forth in R.C. § 2311.04. The Court of Appeals rejected this notion, citing the Ohio Supreme Court in *Renee*:

> . . . The Ohio Supreme Court in its decision in *Renee*, acknowledged the potential conflict between R.C. §§ 2101.31 and 2311.04, without confronting the equal protection implications. The court noted that *the two sections have coexisted since 1853*, found no statement in the Revised Code to suggest that R.C. § 2311.04 supersedes or overrides R.C. § 2101.31, and posited that a determination that R.C. § 2311.04 mandated a jury trial would *effectively nullify* R.C. § 2101.31. Having set forth these considerations and held that R.C. § 2101.31 vests in the probate court the discretion to determine whether factual issues would be tried by a jury, the court declared its holding to be "entirely consistent with the provisions of [R.C. § 2721.10] and *not [in] conflict* with the provisions of [R.C. § 2311.04]."

First National Bank v. Miami University, et al. (emphasis added) (Petitioners' Brief, p. 15-a).

The action contemplated by R.C. § 2101.31 acknowledges that the Probate Court will by the nature of the jurisdiction of that Court, under Ohio law, will have equitable issues of law to consider and rule on. Clearly, the declaratory judgment action filed by the Respondent in this case sought equitable determinations. It was not as the Petitioners have argued, an action in which the Respondent sought the recovery of real or personal property.

Petitioners' argument that R.C. § 2311.04 "mandates jury trials in Ohio Common Pleas Courts where money or specific property is sought" (Petitioners' Brief, p. 17) contains little, if any, relevance to the case at bar. The Respondent-Executor determined it had a duty to proceed in the *Probate Court*, rather

Division of the Court of Common Pleas, and when it did so, R.C. § 2101.31 became the relevant governing authority.

The assertion by Petitioners that they would have been entitled to a trial by jury pursuant to R.C. § 2311.04 had the matter arisen in the General Division of the Court of Common Pleas lacks merit due to the fact that the relief sought is *equitable* in nature. R.C. § 2311.04 provides:

> . . . Issues of fact arising in actions *for money only, or specific real or personal property*, shall be tried by a jury unless a jury trial is waived, or unless all parties consent to a reference under the Rules of Civil Procedure

(Emphasis added).

As the Ohio Court of Appeals below noted, "The right to a jury trial thereby conferred depends upon the nature and character of the relief sought." *First National Bank v. Miami University, et al.* The court further noted, "When the pleadings seek a mixture of legal and equitable relief, the right to a jury trial depends upon the action's primary and predominant objective," citing *Murello Construction Co. v. Citizens Home Savings Co.*, 29 Ohio App. 3d 333, 334, 505 N.E. 2d 637, 638 (1985) and *Huntington National Bank v. Heritage Investment Group*, 12 Ohio App. 3d 113, 114, 467 N.E. 2d 564, 566 (1983). *Id.*

In the case at bar the relief sought was predominantly equitable. Gifts for charitable purposes have always been favored in equity, and trusts created for such purposes are carried into effect upon broad liberal principles of equity jurisprudence under circumstances where a purely private trust may fall. *See Gearhart v. Richardson*, 109 Ohio St. 418, 142 N.E. 890 (1924), and

Springfield v. Patterson, 26 Ohio Misc. 242, 249, 270 N.E. 2d 683, 687 (1970). The Court of Appeals below noted the *Gearhart* court's holding that "*an action construing a will creating a trust is equitable in nature*" (emphasis added). *First National Bank v. Miami University, et al.* Therefore, even if the proceedings had originated in the Court of Common Pleas, R.C. § 2311.04 would not mandate a trial by jury.

Petitioners cite several cases (Petitioners' Brief, p. 17) following the statement:

> Ohio Revised Code Section 2311.04, which mandates jury trials in Ohio Common Pleas Courts where money or specific personal property is sought, has been scrupulously followed in cases where fact finding is required.

This statement may very well be accurate, but it and the authority in the cases that follow do not serve in any way to advance the claims of the Petitioners.

First, the declaratory judgment in the case at bar was initiated in the *Probate Court*, and not in the General Division of the Court of Common Pleas, as were all the cases cited by the Petitioners. Secondly, the cases cited by the Petitioners all involved instances where the relief sought was "*money or specific personal property*" (Petitioners' Brief, p. 17). In the case at bar, the primary and predominant relief sought was held to be *equitable* based on the authority of *Gearhart v. Richardson. See First National Bank of Southwestern Ohio v. Miami University, et al.*, Petitioner's Brief, p. 13-a. The cases cited by Petitioners are clearly not on point, and do not serve as either precedent or even *relevant* authority.

II.

THE TRIAL COURT DID NOT IPSE DIXIT EXTINGUISH THE REVERSIONARY RIGHTS OF THE HEIRS OF THE TESTATOR SO AS TO CONSTITUTE AN IMPERMISSIBLE TAKING IN VIOLATION OF THE FIFTH AND FOURTEENTH AMENDMENTS OF THE CONSTITUTION OF THE UNITED STATES. ON THE CONTRARY, THE TRIAL COURT'S RULINGS WERE SUPPORTED BY THE MANIFEST WEIGHT OF THE EVIDENCE, AND THE PERTINENT WILL PROVISIONS WERE CONSTRUED IN ACCORDANCE WITH THE INTENT OF THE TESTATOR. THE RESPONDENT HEREIN, FIRST NATIONAL BANK, AS A FIDUCIARY, HAD THE AUTHORITY AND THE DUTY, UNDER R.C. §§ 2721.05, 109.25 AND 109.30 TO INITIATE THE DECLARATORY JUDGMENT PROCEEDING; THE TRIAL COURT, THEN, WAS NOT ACTING IPSE DIXIT, BUT RATHER BASED ON AUTHORITY UNDER THE FOLLOWING PROVISIONS OF APPLICABLE OHIO LAW: R.C. §§ 2721.05, 109.25, 109.30, 2311.04 AND 2101.31.

The Respondent, First National Bank of Southwestern Ohio, as a fiduciary, had the authority and a duty to initiate the declaratory judgment proceeding in the Probate Court pursuant to R.C. §§ 2721.05, 109.25 and 109.30. Ohio Revised Code Section 2721.05 provides:

> **2721.05 DETERMINATION OF RIGHTS OR LEGAL RELATIONS**
>
> Any person interested as or through an *executor*, administrator, trustee, guardian, or other fiduciary, creditor, devisee, legatee, heir, next of kin, or cestui que trust, in the administration of a trust, or of the

> estate of a decedent, an infant, lunatic, or insolvent, *may have a declaration of rights or legal relations* in respect thereto in any of the following cases:
>
> > (A) To ascertain any class of creditors, devisees, legatees, heirs, next of kin, or others;
> >
> > (B) To direct the executors, administrators, trustees, or other fiduciaries to do or abstain from doing any particular act in their fiduciary capacity;
> >
> > (C) *To determine any question arising in the administration of the estate or trust, including questions of construction of wills and other writings*

(Emphasis added).

The Petitioners assert in their Brief that there was an "unlawful" and "arbitrary" taking, citing *Wilson v. Iseminger*, 185 U.S. 55, 62 (1902) (Petitioners' Brief, p. 28). To the contrary, the Executor had the authority to initiate the action and the Probate Court had jurisdiction and authority to render judgment under established provisions of the Ohio Revised Code. This clearly can not be properly classified as "unlawful" or "arbitrary." As the Executor of the Estate of the Testator, Walter E. Havighurst, the First National Bank of Southwestern Ohio had the right and the duty to file a complaint for declaratory judgment pursuant to R.C. § 2721.05, and the Probate Court had the authority to adjudicate the matter without a jury pursuant to § 2101.31.

Contrary to the assertions of the Petitioners, there was not an impermissible taking of the reversionary interests of the Petitioners, Alan and Douglas Havighurst. The Ohio Probate Court, vested with proper authority and jurisdiction to adjudicate the matter, found that the Walter E. Havighurst Fund was "designed by the testator 'to promote and fund educational projects' " and that there was a "charitable trust" contained "within the language of [the] residuary clause" (Petitioners' Brief, p. 53-a). The Probate Court furthermore found that the "Walter E. Havighurst Fund is a charitable trust as that term has been construed by the Courts of Ohio" (Petitioners' Brief, p. 55-a).

There is no doubt as to the Testator's manifestation of a *general charitable intent* to provide funding for programs of cross-cultural understanding. The Trial Court made a finding that the Testator "manifested a general charitable intention . . . to donate his residuary estate to charitable purposes" (para. 21, p. 14, *Findings of Fact and Conclusions of Law*) (T.d. 233). After setting forth the requisite preliminary language naming the trustee and establishing the general powers of the trustee, the Testator's Will specifically provides for the income of the trust estate, as well as the principal, if necessary, to be used to establish these programs. The nature of the programs lie within the sole discretion of the President of Miami University, or his or her designee. The President is then provided with a series of *guidelines*, but the Testator goes on to reiterate that the ultimate and sole discretion with respect to the establishment of these programs lies with the President of Miami University.

The Ohio Probate Court, in discussing the guidelines for review of the terms of a "testamentary charitable trust" stated:

> . . . the court must examine the language of the charitable trust to see what the testator intended to

> be accomplished by the administration of the charitable trust. The language of the Havighurst Will *clearly reflects* that the testator intended that the trust funds be used to promote and fund educational projects for building cross-cultural understanding between the peoples of the United States of America and the Union of Soviet Socialist Republics . . .
>
> The Court finds that the continued existence of the political entity formerly known as the "Union of Soviet Socialist Republics" *was not intended* by the testator to be an integral factor in the testator's overall plan concerning the creation and administration of the Walter E. Havighurst Fund . . . The Court further finds that the testator intended the terms "Union of Soviet Socialist Republics," "Soviet Union," and "Soviet" to primarily be descriptive of the "peoples" that inhabited that area of the world. *The fact that the "Union of Soviet Socialist Republics" no longer exists as a political entity is of no importance in carrying out the terms of this charitable trust in accordance with the intent of the testator.*

(Petitioners' Brief, pp. 56-a, 57-a, emphasis added).

The Petitioners claim that the Trial Court has transformed a "private charitable trust" into a "public charitable trust" (Petitioners' Brief, p. 20). This is a gross mischaracterization of the effect of the Trial Court's order. From the language, it is clear and obvious that the Testator manifested a general charitable intent to fund programs through the International Center of Miami University for the purpose of furthering cross-cultural understanding between the "peoples" of the United States of America and those "peoples" of the entity formerly known as the Union of Soviet Socialists Republic. The Trial Court *preserved* the trust estate to *fulfill* the general intent of the Testator.

The claim by the Petitioners that the Probate Court ipse dixit extinguished the reversionary rights of Alan and Douglas Havighurst is without merit. The Probate Court acted within its power and adhered to established Ohio law in rendering judgment and in effectuating the intent of the Testator.

The claims of Alan and Douglas Havighurst are severely undercut as well from a standing viewpoint. If the trust described in Paragraph G of the Havighurst Will was found to have lapsed, the proposed gift of trust would fail and the residuary estate would pass as intestate property according to Ohio's Statute of Descent and Distribution, namely R.C. § 2105.06. However, § 2105.06(F) provides:

> if there is no spouse, no children or their lineal descendants, and no parent surviving, to the brothers and *sisters*, whether of the whole or the half blood of the intestate, or their lineal descendants, per stirpes.

Therefore, the residuary estate of Walter Havighurst would have passed to his sister then living, Mrs. Miriam Havighurst Johnson, and not to the Petitioners. It remains a curious aspect of this case why the Petitioners have continued to pursue this matter, as they would not inherit the residuary estate under Ohio law.

There is no federal question raised by the Petitioners, as there has been no violation of the Fifth and Fourteenth Amendments of the United States Constitution. The Ohio Probate Court did not, as the Petitioners claim, arbitrarily take the reversionary interest of Alan and Douglas Havighurst so as to constitute a violation of the Takings Clause.

Petitioners cite in their brief Justice Blackmun's opinion "... by ipse dixit, may not transform private property into

public property without compensation . . ." *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155 (1980). (Petitioners' Brief p. 21). The term *ipse dixit*, is an assertion by one whose *sole authority* for it is the fact that he himself has said it. Barron's Law Dictionary (3rd ed. 1991). This is clearly not the case here. The Ohio Probate Court was acting within its' authority and under established provisions of the Ohio Revised Code. The claim by Petitioners that the Ohio Probate Court acted unilaterally without outside authority clearly lacks merit.

CONCLUSION

For the reasons given above, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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